Supreme Court of the United States

OCTOBER TERM, 1948.

MIDWEST HAULERS, INC., MUTUAL TRUCKING COMPANY, CARRIERS EQUIPMENT COMPANY, HAYDEN TRUCK LINES, INC.,

Appellants,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

Appellee.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS APPEAL.

The appellee, C. Emory Glander, Tax Commissioner of Ohio, has filed a motion to dismiss this appeal. His stated basis of the motion is "that the validity of statutes of the state of Ohio was not drawn into question in the Supreme Court of Ohio, the court from which this alleged appeal is taken."

A reading of the decision of the Supreme Court of Ohio shows that the statement of the appellee is wholly incorrect. The Supreme Court of Ohio said:

> "We must first determine the question whether the state of Ohio had the power to impose taxes on the sale and use of the items of tangible personal property in question. Most of the items involved in the assessment were trucks, trailers, tires and parts consumed in connection with their operation, and Midwest and Mutual did operate in interstate commerce.
>
> That a state may not impose a tax which is a burden on interstate commerce is an established principle of law. The General Assembly recognized this in providing in Section 5546-2, General Code, that 'the tax hereby levied does not apply to the following sales: * * *
>
> '8. Sales which are not within the taxing power of this state under the Constitution of the United States.'
>
> There is a similar provision in Section 5546-26, General Code, pertaining to the use tax.
>
> It does not follow, however, that interstate commerce is immune from taxation by a state. The Supreme Court of the United States, in interpreting the commerce clause of the federal Constitution, in the case of **Western Live Stock v. Bureau of Revenue**, 303 U. S., 250, 82 L. Ed., 823, 58 S. Ct., 546, 115 A. L. R., 944, stated in the fourth paragraph of the headnotes:
>
> 'The commerce clause does not relieve those engaged in interstate commerce from their just share of the state tax burden, even though the cost of doing the business be thereby increased.' See, also, 51 American Jurisprudence, 262, Section 203.
>
> The sales and use taxes involved in the instant case are nondiscriminatory and do not have a tendency to prohibit interstate commerce; they are not levied on interstate commerce at all but affect such commerce only incidentally and are levied without

discrimination against interstate and intrastate commerce. Only such sales as are made within the state are taxed, and not those sales outside its borders. In our opinion the tax assessment as modified by the Board of Tax Appeals does not constitute such a burden on interstate commerce as to render the assessment invalid under the Constitution of the United States."

150 O. S., 402 at pages 404 and 405.

On the face of the opinion of the Supreme Court of Ohio, the jurisdiction on appeal to this court is apparent. As held in the case of **Charleston Federal Savings and Loan Association v. Alderson**, 324 U. S., 182:

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court." (Op., p. 861.)

That is exactly the situation which exists in this case. Exactly in point is the case of **Central Greyhound Lines, Inc., v. Mealey**, 68 Supreme Court Reporter, 1260, 334 U. S., 653:

"The state urges that the constitutional claims here pressed by the appellant were not passed upon by the New York Court of Appeals. The record does not sustain this challenge to our jurisdiction. The constitutional issues were undeniably raised before the state Tax Commission and on review before the appellate division of the Supreme Court, 266 App. Div. 648, 44 NYS2d 652. The suggestion that these issues were not before the Court of Appeals is based on its statement that the question urged there was 'not one of constitutional taxing

power but of statutory construction.' 296 NY 18, 24, 68 NE2d 855. But the court proceeded to pass upon the constitutional issues and expressly held that 'there is no constitutional objection to taxation of total receipts here. This is not interstate commerce. * * *' 296 NY at 25, 68 NE2d 855. Its amended remittitur stated explicitly that a question arising under the commerce clause of the Constitution 'was presented and passed upon,' and that in sustaining the tax the court 'held that the aforesaid statute as so construed is not repugnant to that provision of the federal Constitution.' This amendment was not a retrospective injection of a nonexistent federal question, but a formal certification that a federal claim had been presented and was adjudicated by the Court of Appeals. It is properly here for review. Section 237 (a) of the Judicial Code, 28 USCA, §344 (a). 8 FCA title 28, §344 (a)."

These authorities show beyond any question that this court has jurisdiction on appeal under the circumstances of this case.

This appeal involves the affirmance by the Supreme Court of Ohio of an order of the Board of Tax Appeals, an administrative tribunal. This court has jurisdiction on appeal in such cases.

Sultan Railway and Timber Co. v. Department of Labor and Industries, 277 U. S., 135.

The language of Chief Justice Taft in **Truax v. Corrigan**, 257 U. S., 312, is directly applicable to this case.

"In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go be-

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hind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. **Kansas City Southern Ry. Co. v. Albers Commission Co.**, 223 U. S., 573, 591, 593; **Cedar Rapids Gas Light Co. v. Cedar Rapids**, 223 U. S., 655, 668; **Southern Pacific Co. v. Schuyler**, 227 U. S., 601, 611." (Op., pp. 324, 325.)

As stated by this court in **Southern Pacific Company v. Arizona**, 324 U. S., 761:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, **this court and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.**"

CASES CITED BY APPELLEE NOT IN POINT.

The cases cited by appellee are not applicable to this appeal. The case of **Eustis v. Bolles**, 150 U. S., 362, was decided on the point that the decision of the Supreme Court was sufficient to sustain the judgment notwithstanding the federal question. That is not true in the instant case.

Stadelman v. Miner, 246 U. S., 544, held that a claim of denial of due process would merely challenge the power of the state court to proceed to a decision and did not draw in question the validity of a statute of the state. The instant case presents an entirely different situation.

Jett Bros. v. The City of Carrollton, 252 U. S., 1, was a case wherein the appellant taxpayer had failed to

exercise his rights under the state statutes to correct the claimed excessive or unfair valuation of his property. Under these facts this court held that no question of the validity of a statute had been raised. The instant case does not present a comparable situation.

The case of **Zucht v. King**, 260 U. S., 174, involved a question of the validity of an ordinance requiring vaccination of all school children. This court dismissed the appeal for the reason that it had theretofore decided that compulsory vaccination was within the police power of a state. The validity of a vaccination ordinance is a far cry from the question involved in the present appeal.

Honeyman v. Hannan, 302 U. S., 375, involved merely the question by what process legal rights may be asserted and legal obligations enforced. This court held:

> "The federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced **provided the method of procedure gives reasonable notice and affords fair opportunity to be heard before the issues are decided.**" (Emphasis ours.)

If this case has any relation to the issues of the instant appeal it is favorable to the appellants. The appellants did not have a "fair opportunity to be heard" in that the uncontradicted evidence was wholly ignored by the Board of Tax Appeals of the state of Ohio and the Supreme Court of Ohio.

The appellee also cites the case of **Memphis Natural Gas Company v. Beeler**, 315 U. S., 649, in which the appeal was dismissed but certiorari was granted. In that case the constitutionality of the statute under which the tax assessment was made was not drawn into question. As hereinbefore pointed out in the instant case, the Su-

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preme Court of Ohio specifically considered the constitutional question. The Memphis Natural Gas Company case therefore has no application to this appeal.

CONCLUSION.

Wherefore, we respectfully request the court to overrule the motion to dismiss for the reason that it is shown on the face of the record that this court has jurisdiction under Sec. 237, paragraph (a) of the Judicial Code, 28 U. S. C., 344 (a).

BENOY & SEBASTIAN,
A. M. SEBASTIAN,
Attorneys for Appellants.